TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 73.

THE CONTINENTAL IMPROVEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH STEAD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED MAY 2[illegible], 1875.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and seventy-four, before the honorable James C. Hopkins, judge of said circuit court, by virtue of the designation of the honorable Thomas Drummond, judge of the seventh judicial circuit of the United States.

JOSEPH STEAD
vs.
THE CONTINENTAL IMPROVEMENT COMPANY. } 3184. Transfer.

Be it remembered that heretofore, to wit, on the 1st day of July, 1873, the plaintiff by Morris & Ferrall, his attorneys, filed in the office of the clerk of said court his declaration in the above-entitled cause, in the words following, to wit:

Joseph Stead complains of the Continental Improvement Com-
2 pany and says that on the day of November, 1872, the defendant by her agents and employees was in possession of and running, operating, and controlling an engine and cars attached thereto on the track of the Grand Rapids and Indiana Railroad in and through the county of La Grange, State of Indiana, and that defendant, while thus running and operating said cars as aforesaid, did at said county carelessly and negligently run said engine and cars against, over, and upon the plaintiff and his wagon, without fault or negligence on the part of the plaintiff, and did then and thereby destroy the plaintiff's wagon, of the value of one hundred dollars, and did then and thereby permanently and incurable injure the plaintiff by crushing, bruising, and wounding him, and by jamming and spraining and otherwise injuring plaintiff's back so as to render him almost helpless.

That by reason of said injuries, received as aforesaid, plaintiff has been compelled to and did lay out and expend a large sum of money in doctoring and caring for himself, to wit, five hundred dollars, all to the damage of plaintiff ten thousand dollars.

3 2nd. For a second cause of action plaintiff says that on the day of , 1872, defendant by its agents and employees was in possession of and was running, operating, and controlling a locomotive and cars attached thereto on the track of the Grand Rapids and Indiana Railroad, running in and through the county of La Grange, State of Indiana, and while thus running, using, and operating said locomotive and cars upon and along said road as aforesaid, defendant did recklessly, wantonly, and with gross carelessly run said engine and cars against, over, and upon the plaintiff while in the lawful act, without fault or negligence on his part, of crossing over said railroad along and upon a public highway leading and across the track of said railroad in the town of Lima, in said county of La Grange.

The defendant, well knowing that the track of said railroad and the approach of said train to said highway were concealed from the view of plaintiff by a deep cut, buildings, and cars standing on the side track, and that it was not the usual time of day for trains to
4 cross said highway, and without ringing the bell or blowing the whistle or giving any signal of the near or rapid approach of said train to said crossing of said highway, did run said locomotive and cars through said town of Lima against and upon the plaintiff, as aforesaid, at the rate of fifty miles an hour, then and thereby, and without the fault or

negligence of the plaintiff, permanently and incurably injure the plaintiff by crushing, jamming, bruising, and wounding him externally and internally, and from said concussion producing irritation of the spinal cord, thereby rendering plaintiff almost helpless for life, to plaintiff's damage ten thousand dollars; wherefore plaintiff demands judgment for ten thousand dollars.

MORRIS & FERRALL,
Att'ys for Pl'ff.

And afterwards, to wit, at the November term of said court, on the 3d day of December, 1874, before the Hon. Thomas Drummond,
5 one of the judges of said court, the following further proceedings were had in the above-entitled cause, to wit:

Comes now the plaintiff by Mess. Coombs, Morris and Bell, his attorneys, and files his additional 3rd paragraph of his complaint herein, in the words following, to wit:

The plaintiff for further and third cause of action says, that heretofore, to wit, on the 22' day of November, 1872, the defendant, the Continental Improvement Company, was occupying and operating a railroad running from Fort Wayne, in the State of Indiana, northward through the village of Lima, in La Grange County, to the northern line of said State, and known and called the Grand Rapids and Indiana Railroad, which said railroad runs upon and across the streets and highways leading into and through said village. That the track of said railroad crosses the Defiance road, one of the principal streets leading into said village, about thirty rods south of the passenger & freight buildings on said railroad in said village. That said depot buildings are & were
6 at the time of the committing of the wrongs hereinafter stated, near the track of said railroad. That the cut where said railroad crosses said Defiance road is, and was at the time of committing the wrongs hereinafter stated, about eight feet deep. And the plaintiff further states that in consequence of the location of said depot buildings and the intervening buildings, shade-trees, and fences and the grade of said road or street, which was and is several feet below the surface of the surrounding and adjoining ground, persons upon said highway or street west of and near to said railroad track could not see northward therefrom the approach of engines and trains on said railroad. That said objects and buildings intercepted the noise of moving trains on said railroad and render it difficult to hear them when approaching said crossing. And the plaintiff further says that all regular and other trains, so far as he knew, passing on said railroad had always been accustomed to stop at said depot, and that they never, so far as he knew, run upon said track in said village without stopping at said depot,
7 nor at a greater rate of speed than six miles per hour, which rendered said crossing safe and secure against trains approaching from the north. And the plaintiff avers that at the time of the happening of the wrongs hereinafter stated the said defendant had placed upon a switch on the west side of the main track of said railroad, immediately south of said depot buildings, and immediately north of said crossing, several freight-cars, and left the same standing thereon so as to obstruct the view and prevent those on said street or highway immediately west of said track from seeing or hearing approaching trains from the north.

And the plaintiff further states that while said cars were standing on said switch, as aforesaid, to wit, on the 22nd day of November, 1872, he was passing on and along said highway or street with a wagon and team of horses, with due and proper care, and near said crossing, going eastward; that in consequence of said buildings, trees, and fences interven-

ing as aforesaid, and the situation and location of said depot-
8 buildings and said freight-cars, and the depression of said high-
way and said railroad track below the surrounding surface, he was unable to see or hear, and did not see or hear, any approaching train on said railroad track, and, knowing it was not the time when trains were accustomed to cross said highway, he attempted, with due and proper care, and without negligence on his part, to pass over said railroad track upon said crossing; that while he was so attempting to cross said track, the defendant, by its principal officers, employees, and servants, run a special train, carrying only the defendant's principal officers and managers, upon and along said railroad at an unusual time and at an unusual, dangerous, and reckless rate of speed, to wit, at the rate of thirty miles an hour, & while so running said on said railroad through said village of Lima at the dangerous, grossly negligent, and reckless rate of speed aforesaid, without stopping at said depot, without ringing a bell or blowing a whistle, or reducing its dangerous
9 rate of speed, wantonly, wil'fully, and with gross negligence, run the locomotive and train so running upon said road as aforesaid against the plaintiff's wagon, in which he was at the time seated, and attempting to cross said track as aforesaid, and thereby broke and destroyed the plaintiff's wagon which of the value of two hundred dollars, and also thereby threw the plaintiff from said wagon to great distance, whereby he was so bruised, crushed, and injured and permanently disabled as that he has not since been and never will be able to do a reasonable day's work or profitably attend to business; and the plaintiff avers that by reason of the injury aforesaid he has suffered and still suffers great pain, and that he has incurred great expense in endeavoring to cure himself of said injuries, to wit, the sum of five hundred dollars.

Wherefore he demands judgment for ten thousand dollars.

MORRIS & FERRALL,
Att'ys for Pl'ff.

And afterwards, to wit, at the November term of said court,
10 on the 6th day of January, 1875, before the Hon. James C. Hopkins, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Baker, Hord, and Hendricks, its attorneys, and files its plea of the general issue herein in the words following, to wit:

Comes the said defendant, by its attorneys in this behalf, and defends the wrong & injury, &c., and for plea herein says that it denies each and every allegation in said declaration contained.

Wherefore, &c.

BAKER, HORD & HENDRICKS
Att'ys for Def't.

And afterwards, to wit, at the term aforesaid of the court aforesaid, and before the Hon. James C. Hopkins, one of the judges of said court, on the 7th day of January, 1875, the following further proceedings were had in the above-entitled cause, to wit:

Come now the parties by their respective attorneys, and this cause coming on to be tried here, comes a jury, to wit, George Stevens,
11 Levin Lewis, Jerry L. Meek, William Gerard, William R. Huff, R. P. C. Barwick, Rezin Ferguson, J. W. Slider, John Israel, Milton Beach, Alexander Johnson, and William Show, who being duly

empanneled and sworn, and having heard a part of the evidence, are now by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the term aforesaid of the court aforesaid, on the 8th day of January, 1875, before the Hon. James C. Hopkins, one of the judges of said court, the following further proceedings were had in the above-entitled cause, to wit:

Come now the parties by counsel, and the jury heretofore empanneled and sworn in this cause also come, and, having further heard the evidence herein, are by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the term aforesaid of the court aforesaid, before the Hon. James C. Hopkins, one of the judges of said
12 court, on the 9th day of January, 1875, the following further proceedings were had in the above-entitled cause, to wit:

Come now the parties, by counsel, and the jury heretofore empannelled and sworn in this cause also come, and, having heard the residue of the evidence herein, are now by the court allowed to separate until the calling of this cause on Monday morning next.

And afterwards, to wit, at the term aforesaid of the court aforesaid, before the Hon. James C. Hopkins, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by counsel, and the jury heretofore empanneled and sworn in this cause also come, and, having heard the argument of counsel and the charge of the court, now retire to their room to consider of their verdict herein.

And afterwards, to wit, at the term aforesaid of the court aforesaid on the 12th day of January, 1875, before the Hon. James C. Hopkins, one of the judges of said court, the following further proceed-
13 ings were had in the above-entitled cause, to wit:

Come now the parties, by counsel, and the jury heretofore empanneled and sworn in this cause also come and return into court the verdict following:

We, the jury, find for the plaintiff and assess his damages at the sum of thirty-five hundred dollars, ($3,500.00.)

And the defendant now moves the court for a new trial herein.

And afterwards, to wit, at the term aforesaid of the court aforesaid, on the 21st day of January, 1875, before the Hon. James C. Hopkins, one of the judges of said court, the following proceedings were had in the above-entitled cause, to wit:

Comes now the defendant, by Baker, Hord, and Hendricks, its attorneys, and files its motion and reasons for a new trial herein in the words following, to wit:

The said defendant, by its attorneys, comes and moves the court to set aside the verdict of the jury rendered in this cause, and to grant a new trial herein, for the following several reasons:

1st. Because said verdict is contrary to the law and the evidence.
14 2nd. Because the court erred in its instructions given to the jury.

3rd. Because the court erred in refusing to give to the jury the special instructions as moved by the defendant.

BAKER, HORD & HENDRICKS,
Att'ys for Def't.

And afterwards, to wit, at the term aforesaid of the court aforesaid, on the 2nd day of February, 1875, before the Hon. James C. Hopkins, one of the judges of said court, the following further proceedings were had in the above-entitled cause, to wit:

Come now the parties by their respective attorneys, and the court being sufficiently advised doth now overrule the defendant's motion for a new trial herein, and the plaintiff, by counsel, now moves the court for judgment upon the verdict of the jury.

It is therefore considered by the court that the plaintiff do recover of the said defendant said sum of three thousand five hundred dollars, ($3,500.00,) together with his costs and charges in this behalf laid out and expended, taxed at $.

15 And afterwards, to wit, at the term aforesaid of the court aforesaid, before the Hon. James C. Hopkins, one of the judges of said court, on the 3rd day of February, 1875, the following further proceedings were had in the above-entitled cause, to wit:

Comes now the defendant, by Mess. Baker, Hord, and Hendricks, its attorneys, and files its bill of exceptions herein, which is signed and allowed, and it thereupon moves for a writ of error to the Supreme Court of the United States, which is allowed upon its filing its bond herein with surety to the approval of the clerk of this court in the penalty of seven thousand dollars, ($7,000.00,) and said bill of exceptions reads in the words following, to wit:

Be it remembered, that on the trial of this cause evidence was duly given to the jury tending to prove that the defendant was at the time and place stated in the declaration in possession of and operating said Grand Rapids & Indiana Railroad; that said railroad passes—

16 north and south—east of and adjoining the village of Lima, a village containing a population of about 600 inhabitants, in La Grange County, Indiana; that at the southeastern corner of said village the railroad is crossed by a highway entering into the village at that point from the east; that the highway crosses the railway-track on its level, but that that crossing is five feet lower than the general level of the highway, and is made by excavation of the bank on either side of the railroad track, the plane of the highway from either side of the track to the top of the bank being about one hundred feet in length; that this crossing is between 400 and 500 feet south of the station-depot of the defendant; that by reason of the points of bank standing on either side of the highway as it descends to the railway-track, and by reason of intervening buildings, and by reason of two freight-cars then standing on the side track west of the main track, a train of cars approaching the highway crossing from the north would not come within the view of a person on the highway approaching the crossing

17 from the west after he had commenced to descend the plane of the highway to the crossing until he came within a few feet of the crossing, at which point the railway-track would be in view up to or beyond the depot.

That on the day named in the declaration, and at an hour when regular trains did not pass, the plaintiff approached the railway-track from the west in a wagon drawn by two horses, he being seated or kneeling upon

some bags in the bottom of his wagon. That he went upon the railroad-track, but before he succeeded in crossing it his wagon was struck by the locomotive drawing a special train of passenger-cars approaching from the north. That plaintiff's wagon was destroyed by the collision and plaintiff himself was seriously injured. That after plaintiff had gone upon the railroad-track the engineer who was in charge of the locomotive used all efforts in his power to avoid the collision, but that a collision was then inevitable. That the engine and train were
18 suitably equipped with appliances for checking and stopping the locomotive and cars. That this train was not running upon the time of any regular train, and that it did not stop at the depot as regular trains did.

Touching the rate of speed at which the train approached the crossing and was running at and immediately before the collision occurred, and touching the signals given by those in charge of the train as it approached the crossing, the evidence was conflicting, a portion thereof tending to show that the train was running at an unusual and improper rate of speed, to wit, about 25 miles per hour, and a portion thereof tending to prove that it was running at a usual and proper rate of speed, to wit, fifteen miles per hour.

A portion of the testimony tended to prove that the customary and proper signals were not given by those in charge of the locomotive and train of their approach to the crossing, and a portion of the testimony tended to prove that the customary and proper signals of such approach were duly given by those in charge of the locomotive and train.

There was evidence further tending to show that the plaintiff
19 with his wagon and team approached the track from a point west of the point where the highway begins to descend to the level of the railway-track, his horses proceeding at a slow trot and he sitting or kneeling upon some bags in the bottom of the wagon, and that there was another team just ahead of his at the time, and further tending to show that he took no precautions to discover whether or not a locomotive or train of cars was approaching from the north, & that his wagon produced much noise as it moved over the frozen ground, and that plaintiff's hearing was somewhat impaired, but that he did not stop his horses before going upon the track of the railroad to listen, and that he did not look or attempt to look northward up the track until his horses had gone upon the railroad-track, and tending to show that plaintiff knew it was not regular train-time—that the next regular train was due from the south, in which direction he looked; also that he did not know anything about the running of irregular trains, & supposed any train from the north would stop at the depot 400 feet north of crossing.

20 There was also evidence adduced tending to show that special trains were frequently run over said railroad and past said village of Lima, & that during the same month in which this accident occurred forty-three such special trains were so run, & that a wood-train was constantly running over that portion of the road upon irregular time, and that might at any time be expected, but not at the rate of speed of this train.

And be it further remembered that at the proper time for asking special instructions to the jury the defendant, by its attorneys, tendered the following instructions, and moved the court to give the same and each of them to the jury, viz:

1st. The uncontradicted testimony in this case shows that the plaintiff was acquainted with the character of this crossing. That he had frequently travelled it, and on some previous occasions had stopped

to look and listen before going upon the track. That upon this occasion he went with his team and wagon upon the track without taking any precaution to ascertain whether a train was coming from the
21 north or not. That he did not even turn his face northward along the track in the direction from which the train was coming until it was too late for him to stop or turn back. That his wagon was making considerable noise as it moved over the frozen ground. That his hearing was to some extent impaired, but he did not stop to listen before going upon the track.

Upon this state of facts the plaintiff is chargeable with such negligence contributing to the accident as deprives him of any right of action.

It is the duty of a railroad company to cause its trains to approach a highway crossing with care and caution, and to give such signals of its approach as custom and a proper regard to the safety of travellers upon the highway demand.

But it is also the duty of a traveller upon the highway to assure himself, either by looking or listening, or both, before going upon the track, that a safe crossing is practicable. The precautions required are greater or less in proportion to the known danger of the crossing. If partial deafness tended to prevent the plaintiff from hearing, he should
22 have stopped so as to listen, without disturbance from the noise of his wagon, or otherwise he should have assured himself by looking along the track that it would be safe for him to cross. Until he had done so it was negligence for him to go upon the track.

If the surroundings of the crossing were such as to impede observation of the railway-track, he should have used such precaution as the circumstances required to assure himself that he could cross safely, before going on the track.

The uncontradicted testimony in this case shows that the plaintiff neglected this duty, and your verdict should be for the defendant.

3d. No law of this State limits the speed of railway trains, and negligence cannot be predicated of the rate of speed merely. The speed at which a train moves cannot be regarded as negligent unless the locality and surroundings are such as to render that rate of speed peculiarly dangerous. The evidence shows that this crossing was not with-
23 in but at edge of the village of Lima, upon a highway leading into the village. There is nothing in the evidence to show that it might not be crossed by railway trains at as high rate of speed as would be proper in the case of other important highways over which there may be like travel.

4th. The engineer of a railway train is not bound to look right and left along highways that he crosses to see whether persons may be approaching the track. His duty is to look ahead in the line of the railway, and to vigilantly observe it. And he has the right to expect that persons and teams will keep out of the way of the locomotive.

5th. It is the duty of every one approaching with his wagon and team along a highway to the crossing of a steam railroad to listen and to look both ways along the railroad before going upon it. If by reason of the character of the ground or other obstructions, or if by reason of a defect in his sense of sight or of hearing, he cannot determine with certainty whether or not a train of cars is approaching without stopping,
24 and if necessary going in advance of his team to examine, it is his duty to do so. If in such case he goes upon the track without taking such precaution, he does so at his own peril, and cannot recover if injury results.

But the court then there refused to give the same or either thereof in charge to the jury, as the most of them were covered by his charge as prepared. And to this said ruling of the court in refusing to give said several instructions so moved, and each thereof or either thereof, the said defendant, by its attorneys, at the proper time excepted.

And thereupon the court of its own notion instructed the jury as follows:

This case resolves itself into one of fact, and mainly rests upon the determination of the following questions:

1st. Whether the injury was caused by the negligence of those who had the management of the train of cars which struck the plaintiff's wagon? and

2nd. Was the pl'ff himself guilty of any fault or negligence which contributed to that result?

25 The last, of course, will be immaterial unless you find the first in favor of the pl'ff.

In determining the first it will be necessary to ascertain what care the def't was required to use under the circumstances. I think they were required to use such care in running their trains as men of common prudence & intelligence would ordinarily use under like circumstances. It is impossible for a court to lay down any absolute or arbitrary rule as to what would be proper care under all circumstances. The law speaks generally of the degree of care necessary, and leave to a jury to determine whether such degree was used.

Care & negligence are relative terms, and what would be deemed proper vigilance & care in one case might be considered negligence in another. The def'ts had the right to run the train through the village of Lima and across this public highway where the collision occurred, but were required to run it with prudence, & to exercise at least ordinary care and vigilance to avoid injury to travellers who might be passing, and

26 as the view of the train from the highway by a party approaching the crossing was obstructed and very nearly cut off by intervening buildings, embankment, & cars standing on the side track, the exercise of greater care & the use of more caution by those in care of a train going at a high rate of speed over the crossing at an 'usual time, & not stopping at the station, became a manifest duty. When in the manner of the running they increase the danger, they should increase proportionately their care and vigilance to avoid it. In view of the fact that it was a cold day, much strong wind from the west, & of this being a crossing in a cut as described & the difficulty in seeing a train coming from the north until it reached within a short distance of the crossing, & the fact that it was not a regular train & this being a highway & crossing over which persons and teams very frequently passed, it is for you to say whether the def't was guilty of negligence in running the train at a too rapid rate of speed and whether they seasonably used all means within their control to give due & proper notice & warning

27 of the approach of the train, and if you should find from the evidence that they did not, then I think you would be warranted in finding negligence on their part. I think they should have used more prudence and caution than a train running on regular time & stopping at the station. Such a train moving through such a place or town should slacken their speed and sound the whistle & ring the bell more energetically than a regular train would be required to do. Persons living along the line of road & frequently passing may be presumed to become acquainted with the time of regular trains and of the rate of speed near depots, at least, & to act accordingly, but for extra trains they have to

rely upon observation, signals, & alarms, and hence the agents and employees having the management & running of such should see to it that reasonable notice and warning is given to avoid accidents, and in places where the train may be hidden from sight by persons in highways approaching crossings, particularly near depots, should reduce the
28 speed of train so as to have it under control & so as to be readily checked, & should use all the means provided for signalling the approach and passing as to furnish reasonable protection to parties whose business and duty require them to pass over such crossing.

From these remarks you will see that what would be reasonable and proper care by the parties running a train approaching a crossing of a highway in an open country, or from the south, at the place of this collision might be held to be negligence and carelessness when the train was coming to this place from the north. But it is unnecessary for me to further consider this character of suggestions, for they, with many others, in solving this question of proper care required of the def't at this time and place, will readily occur to your minds.

If you find that the rate of speed under the circumstances was not unreasonable, & that the usual & ordinary means of warning and signalling the approach and passage of the train were used, & that the parties in charge of the train exercised the care and vigilance
29 necessary to reasonably warn & protect parties from danger, then you will find for the defendants, for they can only be held liable on the ground of negligence.

But if you find the def't guilty of negligence you must go further, & ascertain whether the plaintiff was free from fault, or failed to exercise such care & prudence as the law required of him to avoid collision. For if his carelessness contributed to the injury he cannot recover. The rule of law in such cases is that the pl'ff must be in that fault; that the injury was the result of the negligence of the def'ts solely.

As I said in reference to the duty of the def't, the law does not define with accuracy what is negligence as applicable to every case. It is left as a question of fact for you to say whether he was guilty of carelessness from the evidence. I can say that the plaintiff was required to exercise that degree of prudence, care, and caution incumbent upon a person possessing ordinary reason & intelligence under the special circumstances of the case, having regard to the particular character
30 of the crossing and the difficulty of seeing a train approaching from the north. The law required of him the use of his natural senses & ordinary care, prudence, & caution in approaching a crossing. The fact that hearing was somewhat impaired would not increase the obligation of the def't towards him, or exempt him from the necessity of using the care required of persons in possession of their ordinary senses or faculties. A person suffering under such an infirmity should use more diligently his other faculties.

But, as I said of the def't's, if the place was dangerous and the approach to it by a train obscured, more caution would be required of them; so I say of the plaintiff, he should have proceeded with more caution & circumspection than if the crossing were in an open country. He should have used ordinary care, and not ventured upon the track without ascertaining that no train was approaching, or at least without the use of the means that common prudence would dictate to ascertain such fact. But as this was not a regular train, or on usual
31 time, the same degree of caution would not be on his part, or such as if it were a regular train and on usual time.

The obligations, rights, & duties of r. r's and travellers upon high-

way crossings are mutual and reciprocal, and no greater degree of care is required of the r. r. co's than of the travellers.

The law requires the exercise of such care on the part of both as will under ordinary circumstances avoid danger, & the want of such care it pronounces negligence on the part of the party failing to exercise it. If r. r. runs their trains so as to impose the duty of more than usual caution on the part of travellers, they should in some proper way give notice of the necessity of such increased care before being heard to complain of the want of its exercise.

The customary means of notice of approach is the sounding of the whistle, which is subject to great variations, & when danger may be apprehended the most appropriate and effective one should be
32 given to attract the notice of parties to keep out of the way. The bell should be rung unremittingly until the danger is passed, and the speed should not be unreasonable, but should be reduced so as to give the employees control of the train & to enable them to check or stop it on reasonable notice if collisions with persons or teams liable to be passing or crossing, especially near stations & in villages, is imminent. If the manner of running this train was more hazardous to travellers at that crossing than usually attended the running of trains at that place, I think common prudence would require that greater care & caution should be used to warn travellers of such increased danger before they should be held to more than ordinary care to avoid collision. Some notice of the necessity for the use of more than ordinary care should be shown before requiring its exercise. If no notice or signal was given that this train was to move by that station & crossing at more than the usual rate of speed, or was not going to stop at the station, I think a party should not be required to use more than
33 ordinary care to avoid a collision with a train moving as they usually move over the road at that point.

It is shown by the evidence, and not disputed, that pl'ff was accustomed to pass this crossing, & may be presumed to know & be acquainted with the usual rate of speed with which the trains passed this crossing, & if this train was not moving at a greater rate he should be held as bound to exercise such care & caution as to avoid collision with such trains moving at usual rates & times, so that unless you find that the train was moving at an unusual & unreasonable rate of speed, you would be warranted in finding the plaintiff was guilty of negligence which contributed to the injury, & hence not entitled to recover.

In short, gentlemen, if the engineer seasonably sounded the whistle and rang the bell and approached and passed the crossing at a reasonable and cautious rate of speed, these were all the notices within his power, and they would constitute reasonable and ordinary diligence, and the deft's would be entitled to your verdict.

34 So that on the part of the def'ts the question comes down to consideration of these questions.

1st. Was the train run at unreasonable rate of speed?

2. Was the whistle sounded in due season to notify passers of its approach in time to get out of the way of it? and

3. Was the bell rung also to signal its approach in time, & for a length of time sufficient to warn persons from the track?

If the def'ts were not guilty of negligence in any of these respects, you cannot find a verdict against them.

But if you find the def'ts guilty of negligence, & that the pl'ff was free therefrom, you will then inquire as to the damages the plaintiff has sustained, and award him such sum as will compensate him for all ex-

penses incurred thereby in procuring medical aid, for loss of wagon, of hire & service, for pain and bodily suffering, actually and necessarily sustained; in determining which it will become necessary for you to find whether the injury is of a permanent or curable character, & if curable, within what time. These are questions of fact for you to
35 determine under the evidence, upon which I do not know as I could enlighten you much if I felt disposed; but I do not deem it my duty to enter into an investigation of that matter, but submit to your careful consideration the testimony bearing upon that question, remarking again that the damages recoverable are only compensatory, and should not be enhanced upon the ground that the def'ts are a corporation. Damages are awarded as compensation to the injured party, and he is not entitled to any greater sum by reason of the def'ts being a corporation.

J. C. HOPKINS.

And to the giving of said instructions, and especially to so much thereof as assumed that said train was going at a high rate of speed at the time of the accident, and that the manner of its running was such as to increase the danger to travellers on the highway crossings, and to so much thereof as directed the jury that those in charge of such
36 train, in such a place, should slacken the speed of the train and sound the whistle and bell of the locomotive more energetically than would be required of a regular train, and so much thereof as directed the jury that the persons in charge of such extra trains should on approaching a highway at places where the train is hidden from the sight of travellers upon the highway reduce the rate of speed of the train, so as to have the train under such control as that it may be readily checked.

And to so much thereof as directed the jury that as great care and caution on the part of the plaintiff in approaching to and going upon the railway-track was not required as would have been if the train in question had been a regular train on regular time.

And to so much thereof as directed the jury that if this train of cars was so run as to impose the necessity of more than usual caution on the part of travellers crossing upon the highway, notice of such necessity should in some way be given before the defendant could be heard to complain of the want of its exercise.

And to so much thereof as directed the jury that if the man-
37 ner of running the train in question was attended by more hazard to travellers at the place of the accident than was usual with other trains there, those in charge of the train should be held to more care and caution in warning travellers of the increased danger before travellers should be held to more ordinary care, and that notice of the necessity for extra care should be given before requiring it of the traveller on the highway.

And to so much thereof as directed the jury in substance and effect that inasmuch as the plaintiff was acquainted with the crossing in question, and was presumedly acquainted with the usual speed of trains passing, he was bound to use such care as to avoid collision with trains moving at usual rates and time.

And that the right of the jury to find the plaintiff guilty of contributory negligence, and therefore not entitled to recover, depended upon the question whether the train was not moving at an unusual and unreasonable rate of speed, the said defendant, by its attorneys, at the proper time objected and excepted.

And having received the directions aforesaid, the jury retired
38 for deliberation, and afterwards returned into the court the verdict for said plaintiff set out in the record herein.

And thereupon the said defendant, by its said attorneys, move the court to set aside said verdict and grant a new trial herein, because of the said matters concerning said directions to the jury excepted to as aforesaid, and because said verdict was contrary to the law and the evidence; which motion was by the court overruled.

And thereupon judgment was rendered upon said verdict.

And said defendant, by its attorneys, now here tenders this its bill of exceptions, and prays that the same may be signed and sealed by the court and made a part of the record in this cause; which is accordingly done.

Feb'y 3, 1875.

J. C. HOPKINS, *Judge.*

39 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, J. D. Howland, clerk of the circuit court of the United States in and for said district, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the cause of Joseph Stead against the Continental Improvement Company, as fully as the same remains upon the records now in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 24th day of April A. D. 1875.

[SEAL.] J. D. HOWLAND, *Clerk.*

40 UNITED STATES OF AMERICA, *ss:*

To Joseph Stead, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday in October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the district of Indiana, wherein The Continental Improvement Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness, the Honorable J. C. Hopkins, acting judge of said circuit court of the United States for said district, this 22' day of March, 1875.

J. C. HOPKINS, *Judge.*

41 UNITED STATES OF AMERICA:

The President of the United States of America to the honorable judges of the circuit court of the United States in and for the district of Indiana, greeting:

Because in the record and proceedings, as also on the rendition of a judgment in a plea which is in the said circuit court, before you, between The Continental Improvement Company, plaintiff in error, and Joseph Stead, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on

this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the eleventh day of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court this 22d day of March, A. D. 1875.

[SEAL.] J. D. HOWLAND, *Clerk.*

(Indorsement on cover:) No. 73. The Continental Improvement Company, plaintiff in error, vs. Joseph Stead. Indiana C. C. U. S. Filed 28th May, 1875.

UNITED STATES
Supreme Court.

OCTOBER TERM, 1877.

No. 78.

Continental Improvement Company

vs.

Joseph Stead.

Brief and Argument

FOR PLAINTIFF IN ERROR.

HUGHES, O'BRIEN & SMILEY,
Counsel for Plaintiff in Error.

Dygert, Buff & Rice, Legal and Commercial Printers, Grand Rapids, Mich.

1877.

Continental Improvement Company

VS.

Joseph Stead.

STATEMENT OF THE CASE.

This action was originally commenced in the State Court of Indiana. It was removed therefrom to the United States Court for the district of Indiana, where it was tried by jury.

The Plaintiff, Joseph Stead, alleged that on the 22nd day of November, 1872, while he was crossing the track of the Grand Rapids and Indiana Railroad, in a wagon drawn by two horses, he was, without fault or negligence on his part, struck by a train of cars then being run upon said road by the defendant the Continental Improvement Company which was operating the said railroad and running its train of cars in a negligent and improper manner.

On the trial it appeared that the defendant was operating said railroad at the time alleged, and on that day the plaintiff attempted to cross the track thereof near the village of Lima, Indiana.

That said railroad passes north and south, east of and adjoining said village of Lima, a village containing a population of about six hundred inhabitants, in LaGrange county, Indiana.

That at the southeastern corner of said village the rail road is crossed by a highway entering into the village at that point from the east. That the highway crosses the railway track on its level, but that the crossing is five feet lower than the general level of the highway and is made by excavation of the bank on either side of the railroad track, the plane of the highway from either side of the track to the top of the bank being about one hundred feet in length: That this crossing is between four hundred and five hundred feet south of the station depot of defendant. That by reason of the points of bank standing on either side of the highway as it descends to the railway track, and by reason of intervening buildings, and by reason of two freight cars then standing on the side track west of the main track, a train of cars approaching the highway crossing from the north would not come within the view of a person on the highway approaching the crossing from the west after he had commenced to descend the plane of the highway to the crossing until he came *within a few feet of the crossing at which point the railway track would be in view up to or beyond the depot.*

On the day of the accident, at an hour when regular trains did not pass, the plaintiff approached the railway track from the west in a wagon drawn by two horses, he being seated or kneeling upon some bags in the bottom of his wagon. He drove upon the railroad but before he succeeded in crossing it his wagon was struck by the locomotive drawing a special train of passenger cars approaching from the north. The plaintiff's wagon was destroyed and the plaintiff injured. That after the plaintiff had gone upon the track, the engineer who was in charge of the locomotive used all efforts in his power to avoid a collision but that a collision was then inevitable; that the engine and

train were suitably equipped with appliances for checking and stopping the locomotive and cars. That this train was not running upon the time of any regular train and that it did not stop at the depot as regular trains did.

The evidence was conflicting concerning the rate of speed of the train at and immediately before the accident. Some tending to show that it was running twenty-five miles per hour, and some tending to show that it was running only at fifteen miles per hour.

There was also a conflict of testimony concerning the signals given by the persons in charge of the train, a portion of the testimony tending to show that the customary and proper signals were not given, and a portion tending to show that the customary and proper signals of the approach of the train were duly given by those in charge of the locomotive and train.

The evidence further tended to prove that the plaintiff with his wagon and team approached the track from a point west of the point where the highway begins to descend to the level of the railway track, his *horses proceeding at a slow trot*, and he sitting or kneeling upon some bags in the bottom of the wagon, and that there was another team just ahead of his at the time, and *that he took no precaution to discover whether or not a locomotive or train of cars was approaching from the north; that his wagon produced much noise as it moved over the frozen ground, and that plaintiff's hearing was somewhat impaired, but that he did not stop his horses before going upon the track to listen, and that he did not look or attempt to look northward up the track until his horses had gone upon the railroad track.*

There was testimony tending to show that the plaintiff knew it was not regular train time. That the next regular train was due from the south, in which direction he looked; also that he did not know anything about the running of irregular trains, and supposed that any train from the north would stop at the depot, four hundred feet north of the crossing.

The evidence adduced also tended to show that special trains were frequently run over said railroad and past said village of Lima, and that during the same month in which said accident occurred, forty-three such special trains were so run, and that a wood train was constantly running over that portion of the road upon irregular time and that might at any time be expected, but not at the rate of speed of this train.

1. Upon the uncontradicted portion of the evidence, viz.: That the plaintiff went with his team and wagon upon the track without taking any precaution to ascertain whether a train was coming from the north or not. That he did not even turn his head northward until it was too late for him to stop or turn back. That his wagon was making considerable noise as it moved over the frozen ground. That his hearing was somewhat impaired and he did not stop to look or listen before going upon the track. The court was requested to charge the jury that the plaintiff was guilty of such contributory negligence as would defeat his recovery in the action.

The Court declined to so instruct the jury either in substance or in the language suggested by defendant's counsel and the defendant excepted. (See page 7 of printed record.)

2. The Court was also requested to charge the jury that

it is the duty of a traveller on the highway to assure himself either by looking or listening or both, before going upon the track, that a safe crossing is practicable. That the precautions are greater or less in proportion to the known danger of the crossing.

3. "If partial deafness tended to prevent the plaintiff from hearing, he should have stopped so as to listen without disturbance from the noise of his wagon, or otherwise he should have assured himself by looking along the track that it would be safe for him to cross. Until he had done so it was negligence for him to go upon the track."

The Court declined to so instruct either in substance or in the language of the request, and the defendant excepted.

4. The Court was requested to charge that "If the surroundings of the crossing were such as to impede observation of the railway track, he should have used such precautions as the circumstances required to assure himself that he could cross safely, before going upon the track."

The Court declined so to charge and defendant excepted.

5. The Court was requested to charge the jury that in Indiana no law of the State limited the speed of railroad trains and negligence cannot be predicated of the rate of speed merely. The speed at which a train moves cannot be regarded as negligent unless the locality and surroundings are such as to render that rate of speed peculiarly dangerous.

That the evidence showed that the crossing was not within the village but upon a highway leading into the village, and there was nothing to show that it might not be crossed at as high a rate of speed as would be proper in the

case of other important highways over which there may be like travel.

The Court declined so to charge and the defendant excepted.

6. The Court was also requested by the defendant to charge the jury that "The engineer of a railway train is not bound to look right and left along highways that he crosses to see whether persons may be approaching the track. His duty is to look ahead in the line of the railway and to vigilantly observe it, and he has a right to expect that persons and teams will keep out of the way of the locomotive."

But the Court declined to give such instruction and the defendant excepted. (See page 7, printed record.)

7. The Court was also requested to charge that "It is the duty of every one approaching with his wagon and team along a highway to the crossing of a steam railroad, to listen and to look both ways along the railroad before going upon it. If by reason of the character of the ground or other obstructions, or if by reason of a defect in his sense of sight or of hearing, he cannot determine with certainty whether or not a train of cars is approaching without stopping and if necessary going in advance of his team to examine, it is his duty to do so. If in such case he goes upon the track without taking such precaution, he does so at his peril and cannot recover if injury results."

This the Court refused to give and the defendant excepted.

The Court on its own motion in charging the jury, used this language:

8. "And as the view of the train from the highway by a party approaching the crossing was obstructed and nearly

cut off by intervening buildings, embankments and cars standing on the side track, the exercise of greater care and the use of more caution by those in care of a train going at a high rate of speed over the crossing at an unusual time and not stopping at the station became a manifest duty. * * * * I think they should have used more prudence and caution than a train running on regular time and stopping at the station. Such a train moving through such a place or town, should slacken their speed and sound the whistle, and ring the bell more energetically than a regular train would be required to do, * * * * and in places where the train may be hidden from sight by persons in highways approaching crossings, particularly near depots, should reduce the speed of the train so as to have it under control and so as to be readily checked." (See pages 8 and 9, printed record.)

9. Again in his charge the Court said, "He should have used ordinary care and * * * * But as this was not a regular train or on usual time the same degree of caution would not be required on his part or such as if it were a regular train and on usual time. (See page 9, printed record.)

10. Again in his charge the Court said, "If railroads run their trains so as to impose the duty of more than usual caution on the part of travelers, they should in some proper way give notice of the necessity of such increased care before being heard to complain of the want of its exercise. * * * * If the manner of running this train was more hazardous to travelers at that crossing than usually attended the running of trains at that place, I think common prudence would require that greater care and caution should be used to warn travelers of such increased danger before

case of other important highways over which there may be like travel.

The Court declined so to charge and the defendant excepted.

6. The Court was also requested by the defendant to charge the jury that "The engineer of a railway train is not bound to look right and left along highways that he crosses to see whether persons may be approaching the track.

His duty is to look ahead in the line of the railway and to vigilantly observe it, and he has a right to expect that persons and teams will keep out of the way of the locomotive."

But the Court declined to give such instruction and the defendant excepted. (See page 7, printed record.)

7. The Court was also requested to charge that "It is the duty of every one approaching with his wagon and team along a highway to the crossing of a steam railroad, to listen and to look both ways along the railroad before going upon it. If by reason of the character of the ground or other obstructions, or if by reason of a defect in his sense of sight or of hearing, he cannot determine with certainty whether or not a train of cars is approaching without stopping and if necessary going in advance of his team to examine, it is his duty to do so. If in such case he goes upon the track without taking such precaution, he does so at his peril and cannot recover if injury results."

This the Court refused to give and the defendant excepted.

The Court on its own motion in charging the jury, used this language:

8. "And as the view of the train from the highway by a party approaching the crossing was obstructed and nearly

cut off by intervening buildings, embankments and cars standing on the side track, the exercise of greater care and the use of more caution by those in care of a train going at a high rate of speed over the crossing at an unusual time and not stopping at the station became a manifest duty. * * * * I think they should have used more prudence and caution than a train running on regular time and stopping at the station. Such a train moving through such a place or town, should slacken their speed and sound the whistle, and ring the bell more energetically than a regular train would be required to do, * * * * and in places where the train may be hidden from sight by persons in highways approaching crossings, particularly near depots, should reduce the speed of the train so as to have it under control and so as to be readily checked." (See pages 8 and 9, printed record.)

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10. Again in his charge the Court said, "If railroads run their trains so as to impose the duty of more than usual caution on the part of travelers, they should in some proper way give notice of the necessity of such increased care before being heard to complain of the want of its exercise. * * * * If the manner of running this train was more hazardous to travelers at that crossing than usually attended the running of trains at that place, I think common prudence would require that greater care and caution should be used to warn travelers of such increased danger before

they should be held to more than ordinary care to avoid collision, and some notice of the necessity for the use of more than ordinary care should be shown before requiring its exercise. * * *

I think a party should not be required to use more than ordinary care to avoid a collision with a train moving as they usually run over the road at that point.

The Court further charged:

"It is shown by the evidence and not disputed that plaintiff was accustomed to pass this crossing and may be presumed to know and be acquainted with the usual rate of speed with which trains passed this crossing, and if this train was not moving at a greater rate, he should be held as bound to exercise such care and caution as to avoid collision with such trains moving at *usual rates and times*, so that unless you find that the train was moving at an unusual and unreasonable rate of speed, you would be warranted in finding the plaintiff was guilty of negligence which contributed to the injury, and hence not entitled to recover." (See page 10, printed record.)

To each one of the foregoing instructions given to the jury by the Court, upon his own motion, the defendant's counsel excepted. (See exceptions on page 11, printed record.)

The questions in the case then all arise upon the refusal of the Court to charge as requested by defendant's counsel, and upon the correctness of his instructions to the jury upon his own motion.

ASSIGNMENTS OF ERROR.

I. Said Court erred in refusing to charge the jury: That if the plaintiff went with his team and wagon upon the track without taking any precaution to ascertain whether a train was coming from the north or not, and if he did not turn his face northward until it was too late for him to stop or turn back. If his wagon was making considerable noise as it moved over the frozen ground, and if his hearing was somewhat impaired and he did not stop to look or listen before going upon the track, then he was guilty of such contributory negligence as would defeat his recovery in the action.

II. Said Court erred in refusing to instruct the jury as requested by defendant's counsel, as follows:

"It is the duty of a traveler on the highway to assure himself either by looking or listening, or both, before going upon the track, that a safe crossing is practicable. That the precaution should be greater or less in proportion to the known danger at the crossing."

III. Said Court also erred in refusing to give the jury the following request to charge:

"If partial deafness tended to prevent the plaintiff from hearing, he should have stopped so as to listen without disturbance from the noise of his wagon, or he should have otherwise assured himself by looking along the track, that

it would be safe for him to cross; until he had done so it was negligence for him to go upon the track."

IV. Said Court erred in refusing to charge the jury as requested by defendant's counsel, as follows:

"If the surroundings of the crossing were such as to impede observation of the railway track, he should have used such precaution as the circumstances required, to assure himself that he could cross safely before going upon the track."

V. Said Court erred in refusing to give the following request of the defendant to the jury:

"In Indiana no law of the State limits the speed of railroad trains, and negligence cannot be predicated of the rate of speed merely.

"The rate of speed at which a train moves can not be regarded as negligence unless the locality and surroundings are such as to render that rate of speed peculiarly dangerous.

"That the evidence shows that the crossing was not within the village but upon a highway leading into the village, and there is nothing to show that it might not be crossed at as high a rate of speed as would be proper in the case of other important highways over which there may be like travel."

VI. Said Court erred in refusing to charge the jury as requested by defendant, as follows:

"The engineer of a railway train is not bound to look right and left along highways that he crosses, to see whether persons may be approaching the track.

"His duty is to look ahead in the line of the railway, and to vigilantly observe it, and he has a right to expect that persons and teams will keep out of the way of the locomotive."

VII. The Court also erred in refusing to charge the jury as requested by defendant, as follows:

"It is the duty of every one approaching with his wagon and team along a highway to the crossing of a steam rail road to listen and to look both ways along the railroad before going upon it. If by reason of the character of the ground or other obstructions, or if by reason of a defect in his sense of sight or of hearing he cannot determine with certainty whether or not a train of cars is approaching without stopping, and if necessary, going in advance of his team to examine, it is his duty to do so. If in such case he goes upon the track without taking such precaution, he does so at his peril and cannot recover if injury results."

VIII. Said Court erred in charging the jury upon his own motion, as follows:

"And as the view of the highway by a party approaching the crossing was obstructed and nearly cut off by intervening buildings, embankments and cars standing on the side track, the exercise of greater care and the use of more caution by those in care of a train going at a high rate of speed over the crossing, at an unusual time and not stopping at the station, became a manifest duty. * * * *

"I think they should have used more prudence and caution than a train running on regular time and stopping at the station. Such a train moving through such a place or town should slacken their speed, and sound the whistle, and ring the bell more energetically than a regular train would be required to do. * * * And in places where the train may be hidden from sight by persons in highways approaching crossings, particularly near depots, should reduce the speed of the train so as to have it under control and so as to be readily checked."

IX. Said Court also erred in charging the jury on his own motion as follows:

"He should have used ordinary care. * * * But as this was not a regular train or on usual time, the same degree of caution would not be required on his part or such as if it were a regular train and on usual time."

X. Said Court erred in charging the jury on his own motion, as follows:

"If railroads run their trains so as to impose the duty of more than usual caution on the part of travelers, they should in some proper way give notice of the necessity of such increased care before being heard to complain of the want of its exercise.

"If the manner of running this train was more hazardous to travelers at that crossing than usually attended the running of trains at that place, I think common prudence would require that greater care and caution should be used to warn travelers of such increased danger before they should be held to more than ordinary care to avoid collision. Some notice of the necessity for the use of more than ordinary care should be shown before requiring its exercise. * *

"I think a party should not be required to use more than ordinary care to avoid a collision with a train moving as they usually run over the road at that point."

XI. Said Court erred in charging the jury as follows, upon his own motion:

"It is shown by the evidence, and not disputed, that plaintiff was accustomed to pass this crossing and may be presumed to know and be acquainted with the usual rate of speed with which trains passed this crossing, and if this train was not moving at a greater rate he should be held as

bound to exercise such care and caution as to avoid collision with such trains moving at *usual rates and times*, so that unless you find that the train was moving at an unusual and unreasonable rate of speed, you would be warranted in finding the plaintiff was guilty of negligence which contributed to the injury, hence not entitled to recover."

BRIEF OF THE ARGUMENT.

I.

A person about to cross a railway track should use his senses of seeing and hearing to ascertain whether a train is approaching, and whether it will be safe for him to cross; the failure to do so, under ordinary circumstances, is *negligence in law.*

If his sense of hearing is impaired, he should satisfy himself by looking up and down the track before attempting to cross; a failure to do so, umder such circumstances, *is negligence in law.*

If his vehicle makes much noise while in motion, he should *stop* and listen as well as look for a train; and a failure to do so *is negligence in law.*

To approach a railway crossing with horses and vehicle, on a trot, the vehicle making much noise, the persons sense of hearing being impaired, without stopping to look or listen, and without attempting to look up the track in one direction to see if a train is approaching, is negligence in law, and if under such circumstances the person crossing suffers injury, he is in law held guilty of such contributory negligence that he cannot recover damages.

This question is precisely and plainly presented by the first and fifth requests to charge, found on pages six and seven of the printed record, and by the assignments of error numbered one, two, three, four and seven.

The following authorities are cited to sustain the point:

Pennsylvania Railroad Co., vs. Beale, 73 Penn. St., 504, and 509.

Pennsylvania Canal Co., vs. Bentley, 66 Penn. St. 30.

Hanover Railroad Co. vs. Coyle, 55 Penn. St., 396.

Allyn vs. Boston and Albany Railroad Co., 105 Massachusetts, 78.

Baxter vs. The Troy and Boston R. R. Co., 41 N. Y., 502.

P. F. W. & C. Railway Co. vs. Denin, 56 Penn. St., 280.

Ernst vs. Hudson River Railroad Co., 39 N. Y., 61.

Lake Shore and Michigan Southern R. R. Co. vs. Miller, 25 Michigan, 274.

The Bellefontaine Railway Company vs. Hunter, Adm., 33d Ind., 361 and 364.

Stubley vs. L. & N. W. Railway Co. 1 Exch. 18.

Chicago and Rock Island Railroad Company vs. James McKean, 40 Ill., 218 and 236.

Morse vs. Erie R. R. Co., 491, 65 Barbour, (N. Y.)

Butterfield vs. Western Railroad Co., 10 Allen's, 532.

N. Penn. Railroad Co. vs. Heileman, 49 Penn., St. 60.

The St. Louis, etc., R. W. Co., vs. Mathias 50 Ind. 66.

Haines vs. The St. Louis Cent. R. Co., 41 Iowa, 227.

Mackey vs. The N. Y. Central Railroad Co., 27 Barb. 528.

Haight vs. N. Y. Cent. Railroad Co., 7 Lansing, 11.

Gonzales vs. N. Y. and Harlem Railroad Co., 38 N. Y., 440.

St. L. A. & T. H. Railroad Co. vs. Manley, 58 Ill., 300.

Bersergel vs. N. Y. Cent. Railroad Co., 40 N. Y. 9.

Havens vs. Erie Railway, 41 N. Y., 296.

II.

There is no law of Indiana limiting the rate of speed of a railroad train, and negligence cannot be predicated of the rate of speed merely.

This point is raised by the defendants third request to charge the jury, found on page seven of the printed record, and the fifth assignment of error.

See the following authorities:

McKoukey vs. The C. B. & Q. R. Co., 40 Iowa, 205.

Flattes vs. The Chicago, Rock Island and Pacific Railroad Co., 3 Iowa, 193.

Sherman and Redfield on Negligence, sec. 478.

Withers vs. The North Kent Railroad Co., 3 Hurlst, and Norman's, 970 and 971.

III.

A locomotive engineer is not bound to look to the right and left along the road to see whether persons are crossing the track. He should look ahead on the line of the railway and has a right to presume that persons will keep off the track and out of the trains way, and to run his train upon that theory until he sees there is actual danger, that they will not keep clear of the track.

This point is raised by the defendant's 4th request to charge; page 7, printed record, and by the 6th assignment of error.

St. L., A. & T. H. Railroad Co. vs. Manly, 58 Ill., 300.

Sherman & Redfield on Negligence, p.p. 538 and 539.

Wharton on Negligence, Secs. 389, 389a and 803.

Lake Shore & Michigan Southern Railroad Co. vs. Miller, 25 Michigan, 277.

Phila. & R. Railroad Co. vs. Spearen, 47 Penn., 304.

IV.

There is no difference in the degree of care and prudence required in running a train on the usual time or on unusual time. There is no greater care and prudence required in running a special or a regular train, and the degree of care is the same whether the train stops at the station or not; nor should such a train slacken its speed, or ring its bell, or sound its whistle more energetically than a regular train that stops.

This point is raised by the charge of the court, on page 8 of printed record, folios 26 and 27, and by the 8th assignment of error. See also p. 10, folio 23, and the eleventh assignment of error.

See the following authorities:

1st Redfield's Law of Railroads, 568 and 569.

Wilcox vs. Rome, Watertown and Og. Railroad Co., 39 N. Y., 358 and 362.

Wilds vs. The Hudson R. Railroad Co., 29 N. Y., 325.

Dascomb vs. Buffalo and State Line Railroad Co., 27 Barbour, 226.

Stubley vs. L. & N. W. R. W. Co., 1, Court of Ech., 17.

V.

The degree of care required of a person about to cross a railway track does not depend upon whether the train approaching is a regular train or upon the regular train time, but such person is bound to use his eyes and ears at all times when crossing, and keep a look out for any train which might be passing.

This point is presented by the charge of the Court at page 9 of printed record, at folio 31, and by the 9th assignment of error.

Authorities:

1st Redfield's law of Railways, 568 and 569.

Northern Pennsylvania Railroad Co., vs. Hulman, 49 Penn., S. 60.

Penn. Canal Co. vs. Bentley, 66 Penn., S. 30.

Bellefontine R. W. Co. vs. Hunter, Adm., 33 Ind., 365.

Dascomb vs. Buffalo and State Line Railroad Co., 27 Barbour 222.

Wilcox vs. Rome, Watertown and Og. Railroad Co., 39 N. Y., 362 and 365.

Chicago & Alton Railway Co. vs. Gretzner, 46 Ill., 82.

Sherman and Redfield on Negligence, Sec. 488.

VI.

The carelessness or negligence of the railroad company in running its train cannot and does not dispense with due care on the part of the person crossing their track, the negligence of the railroad company and due care and caution on the part of the person crossing, must concur to entitle the plaintiff to recover.

This point arises from the charge of the court on page 10, folios 31 and 32 printed record, and the 10th assignment of error.

Authorities:

Robinson vs. Fitchburg and Worcester Railroad Co., 7 Gray, (Mass.) 92.

Lane vs. Crombie, 12 Pick., 177.

Adams vs. Carlisle, 21 Pick., 146.

The St. Louis, etc., R. W. Co. vs. Mathias, 50 Ind., 66 and 82.

Bellefontaine Railroad Co. vs. Hunter, Adm., 33 Ind., 361.

Donaldson vs. Milwaukee, &c. Railroad Co., 21 Minn.,293.

Chicago & Alton Railroad Co., vs. Gritzner, 46 Ill., 75.

Lake Shore & Mich. Southern Railroad Co. vs. Miller,25 Mich., 274.

The Evansville, &c., Railroad Co. vs. Hiatt, 17 Ind., 102.

C. & R. I. Railroad vs. McKean, 40 Ill., 218.

Gonzales vs. N. Y. & Harlem Railroad Co., 38 N. Y., 440.

ARGUMENT.

MAY IT PLEASE YOUR HONORS:—

In the bill of exceptions in this case it is stated as an undisputed fact, appearing upon the trial, that the plaintiff was accustomed to pass the crossing where the accident in question occurred. (See folio 33 of the printed record, where the judge so stated in his charge to the jury.)

It farther appears at folio 19, of the printed record, that the evidence tended to show that the plaintiff approached the crossing from the west, his horses proceeding at a slow trot, and he was sitting or kneeling upon some bags in the bottom of the wagon. That he took no precautions to discover whether or not a locomotive or train of cars was approaching from the north; that his wagon produced much noise as it moved over the frozen ground; that his hearing was somewhat impaired, but that he did not stop to listen and did not look or attempt to look northward upon the track until his horses had gone upon the railroad track.

The bill of exceptions does not state expressly that this evidence was uncontradicted, but, as the bill purports to state upon which points the evidence was in conflict, and states that the evidence tended to show this, and does not state that there was any conflict upon the point it impliedly, at least states, that these were the facts as they appeared from the evidence in the case.

This, however, is not all important, because if these facts were disputed, the judge should have instructed the jury that if they found them as stated, then, the plaintiff, could not recover, and if they were not contradicted he should have directed the jury absolutely that the plaintiff could not recover, neither of which he did.

The question raised by the record as to contributory negligence of a traveler about to cross a railway track has very often been considered by the courts. The authorities are quite uniform in holding that attempting to cross a track without looking or attempting to look and without listening, is a total want and disregard of care, which is in the law negligence, *per se*.

In Pennsylvania Railroad Company vs. Beale, 73 Penn. St., 504, the facts in some respects were similar to the present case. There the train could not be seen until within about ten feet of the track. The plaintiff did not stop there to look or listen, although he had been listening before. Sharswood J, said: "It was his plain duty to have stopped at that place. * * * Indeed the duty of stopping is more manifest when an approaching train cannot be seen or heard than when it can. If the traveler cannot see the track by looking out, whether from fog or other cause, he should get out and if necessary lead his horse and wagon. A prudent and careful man would always do this at such a place. There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court."

In North Penn. Railroad Company vs. Heileman, 49 Pa.,

St. 60, the plaintiff was driving down Dauphen street towards the railroad in a baker's wagon. The grade was slightly above the railroad and a bank of earth intervened so that only at certain points could an approaching train be seen from the street. The plaintiff did not look and was sitting far back in his wagon with curtains down. Strong J., in delivering the opinion of the court, said: "The court conceded that looking out for the approach of a train is a duty when a traveler is about to cross a railroad track, but instead of charging the jury that failure to look out is negligence, instructed them that it was evidence of negligence. This was not all the defendants asked nor all they were entitled to have. Absence of such a precaution was more than evidence of negligence. It was negligence itself, and it was such as may have contributed to the plaintiff's injury."

After stating that negligence is generally a question for the jury, he proceeds: "But when the standard is fixed, where the measure of duty is defined by the law, entire omission to perform it is negligence, * * * Not looking at all is an entire absence of vigilance."

In the case now before the court we have the statement that the plaintiff did not look or attempt to look for an approaching train, and that he might have seen the train upon the track up as far as the depot from the highway he was traveling, at a point several feet from the track had he looked. (See folios 17 and 19 of the printed record.)

In Hanover Railroad Company vs. Coyle, 55 Penn. St., 396, 401, Agnew J., in delivering the opinion of the court, said: "It seems clear that Coyle approached the crossing of the railroad muffled up, sitting within the covered top of his wagon, taking no notice of the railroad which he well knew for he had often crossed it before, and drove slowly

upon the track without stopping or looking out so far as anything in the evidence discloses the fact to us. It also shows that at this point a traveler passing in the direction Coyle was going, cannot see up and down the track in consequence of the position of Kohler's house until he has gotten within sixteen feet of the track. It is very manifest therefore that Coyle was guilty of negligence in omitting to stop and look out for the cars."

Allyn vs. B. & A. R. R. Co., 105 Mass., 77, was a case where the plaintiff did not look for a train when about to cross the railroad track, and the court was asked to charge the jury that there was no evidence to submit to the jury. *Held*, that such instructions should have been given. Morton J. said: The burden is upon the plaintiff to show affirmatively that he was in the exercise of due care; the question of due care is generally for the jury to determine, but when the uncontroverted facts in a case show negligence on the part of the plaintiff, or when there is no evidence to show that he used due care, it is the duty of the court to instruct the jury to return a verdict for the defendant. * * * * A railroad crossing is a place of danger and common prudence requires that a traveler approaching one, should use the precaution of looking to see if a train is approaching. If he fails to do so the general knowledge and experience of men at once condemn his conduct as careless. * * * The fact that the plaintiff did not know that there was a railroad there is no admissable excuse, because it is obvious that any man who had his sight and used it must have seen that he was approaching a railroad crossing.

In Butterfield vs. Western Railroad Corporation, 10 Allen, 532, the plaintiff did not look to see whether a train was approaching. *Held* that there was no evidence to be

submitted to the jury, and that they should have been instructed to return a verdict for defendant. It was a stormy night, raining, and snowing, and blowing hard, and it was in evidence that the bell did not ring or the whistle blow, still it was held that the negligence did not excuse him.

Wilcox vs. the Rome, Watertown and Ogdensburgh Railroad Company, 39 N. Y., 358, is a case wherein the authorities are reviewed.

Miller, J. in delivering the opinion said: "I think we must assume that he (deceased) did not look, and in failing to do so he neglected a plain and imperative duty and was guilty of negligence which precluded a recovery. A traveler in crossing a railroad track is bound to exercise at least ordinary sense, prudence and capacity, and this requires that he should use his ears and eyes so far as he has opportunity to do so. None of the cases adjudicated exonerate him from employing his faculties."

It is alleged by Miller J. in that case, that the cases are exceptional which hold that the question should be submitted to a jury. That whenever a persons eyes will be of any avail he must use them, and whenever he may hear he must use his sense of hearing.

Apply these principles to this case and it is clear that the plaintiff could not recover. The evidence is that he did not look or attempt to look, although he might have seen the train for more than four hundred feet up the track before he entered upon the crossing. It appears he did not look when his eyes would have availed him. He did not stop to listen although his wagon was making much noise over the frozen ground. There is no pretense that he could not hear, it is only stated that his hearing was *some-*

what impaired. The necessity then was greater both for stopping to listen and for looking for an approaching train.

In the case last cited (39 N. Y., 367,) Grover I, in delivering the unanimous opinion of the court of which Justice Hunt of this court was then Chief Justice, said: "The only question in the case therefore necessary to consider is whether it was negligence in the deceased to expose himself in that dangerous position without even looking along the track behind as well as before him, to see if there was a train approaching. That he did not look is established by the fact that if he had he must have seen the train in ample time to have enabled him to step off the track and thus have avoided the danger, which he failed to do. There was no explanation of his conduct. No evidence of any other engine in motion in the vicinity or any cause whatever assigned for diverting the attention of the deceased from his own safety. Under such circumstances, to walk along or stand upon a railroad track without availing himself of the sense of sight as well as hearing, to ascertain whether there was danger in such position, is not only negligence but borders on rashness. It is no answer to say that this engine was not moving at that point upon the time of any regular train. If the deceased was sufficiently acquainted with the business of the defendant as to know the time of the different trains, he must also have known that working and other trains and engines passed over the road or portions of it at other times, that it was necessary for them so to do in order to avoid the regular trains. It would be the grossest carelessness for one to place himself upon the track without at all attending to his safety, relying upon the fact that it was not the time for a regular train to pass over that portion."

In the same case and also in the case of Baxter vs. the Troy and Boston Railroad Company, 41 N. Y., 502, it was held that the failure on the part of the company to ring the bell and sound the whistle did not relieve the plaintiff of the duty of exercising due care It might be negligence in the company, but it could not constitute due care on the part of plaintiff.

The case of the Lake Shore and Michigan Southern Railway Company vs. Miller, 25 Mich., 274, is a leading case upon the subject in that State. It is also a well considered case and many of the authorities are there cited and reviewed.

In that case the plaintiff and her servant attempted to cross the track of the defendant's railroad in the country. By reason of the locality and some wood piled near the track, the cars could not be seen in most places approaching the track from the highway. The driver looked at his watch and thought it was not within an hour of train time. The train was in fact an half hour or more late. They did not stop to listen and the plaintiff's testimony tended to show that they did not look either way. They could have seen up the track when within twenty-six feet of it.

Christancy J., delivering the opinion of the court, said: "The track itself is a warning of danger to those about to go upon it, and I think it must be laid down as a principle of law that persons about to cross a railroad track are bound to recognize the danger and to make use of the sense of hearing as well as sight, and if either cannot be rendered available, the obligation to use the other is the stronger to ascertain before attempting to cross it whether a train is in dangerous proximity, and if they neglect to do this, but

venture blindly upon the track without any effort to ascertain whether a train is approaching, it must be at their risk, such conduct is of itself negligence, and should be so pronounced by the courts as matter of law. * * * Nor is it any excuse to the plaintiff that he was absent minded and did not look to see or stop to hear the cars. It is a duty which he has no right to neglect, and to claim damages of the company arising even in part from that neglect."

It was also held that the burden was upon the plaintiff to show that she acted with due care and that her own negligence did not contribute to the injury.

In Indiana the same doctrine has been fully recognized and declared by the courts.

In Bellefontaine Railway Company vs. Hunter, Adm., 33 Ind., 364, Ray C. J., in delivering the opinion of the court, said: "We think the law may be regarded as fixed that no neglect of duty on the part of a railroad company will excuse any one approaching a crossing from using the senses of sight and hearing, where these may be available, and injury where the use of such faculties would have given sufficient warning to enable the party to avoid the danger, conclusively shows negligence, and there can be no recovery unless the railroad company has been guilty of such conduct as will imply an intent to cause the injury."

In Telfer, Administrator, vs. the Northern Railroad Co., 30 N. J., 188, where the action was for killing the plaintiff's son who was crossing the railroad on a public highway, The Court said: "In crossing ordinary roads caution and care are chiefly demanded to avoid running against or over anybody else. In crossing railroads it is exacted to avoid being run over yourself. In the former case the

blame attaches *prima facia* to the party doing the injury; in the latter it attaches in the first instance to the party obstructing the track. Whether the whistle was blown or bell rung upon the approaching engine, is immaterial, if the boys knew or with ordinary caution might have known in time to avoid the collision, that the train was approaching. * * * Nor does it at all change the case that the party does not think of the cars. He was bound to think of them if he knew the road was there. Nor is it any excuse that he was in a covered wagon and did not see fit to look, for a person cannot close his eyes or cover himself up in the midst of danger and then plead that he could not see. It is not a trifling matter to stop a train of cars where it would not otherwise stop, where it is running on time and is required to pass another train at a given point, and where the failure to do so might produce serious consequences.

The question has several times been before the Supreme Court of Iowa, and was recently considered by that court in the case of Haines vs. Illinois Central Railroad Co., 41 Iowa, 227.

The plaintiff had long lived near the track and was in the habit of crossing it daily. In approaching the track by the highway, the railway was only visible from some points, being obscured in part by hills, brush, &c. For some distance the track was entirely obscured until the plaintiff was within seventeen feet of the track. The plaintiff testified that he looked for the train on his way to the crossing, but he *did not testify that he listened for it when the view of the track was wholly cut off near the crossing, nor that he looked or listened for it after he reached the seventeen feet point near the crossing where the view of the track was wholly unobscured.*

There was a conflict of testimony as to whether the bell was rung and whistle sounded, and also as to the speed of the train. The court was asked to instruct the jury that if plaintiff approached the crossing without looking in the direction from which the train was coming, and without stopping his team to listen for an approaching train, it was negligence and he could not recover.

The court did not so instruct the jury but charged them as follows: "If you find the plaintiff by exercising ordinary care in approaching said crossing, using his senses of hearing and seeing, and by looking could have seen the train in time to have avoided the accident, which he neglected, he cannot recover."

And it was argued that this was equivalent to the request to charge which was not given. But the court said: "This instruction is *general* and leaves the whole question as one of fact for the jury to find, while those asked called the attention of the jury to specific facts and told them that such facts constituted negligence as matter of law.

"The general character of this instruction must have caused the jury to entirely overlook it, for if they had comprehended and regarded it at all it is difficult to see how they could have found the verdict they did under the evidence."

It will be noticed that the instructions asked in this case in the first and fifth requests of the defendant were *specific*, and very similar to those asked in the case of Haines vs. the Illinois Central Railroad, and that the instructions given by the court were general. See the requests on pp. 6 and 7, and the charge as given on p. 9, folios 29 and 30.

The English rule is the same, it has long been the settled law there. A leading case is that of Stubley vs. The

London and North Western Railway. 1 Ex. Law Rep. 13. The railway was crossed by a public footway on a level and was protected by gates on each side of the line, and caution boards were placed near the gates. The view of the line from one of the gates was obstructed by the pier of a railway bridge crossing the line. A woman approaching the line by that gate was detained by a luggage train on her side and immediately on its having passed, crossed the line and was run down and killed by a train coming along the other line of rails. Held that there was no negligence by the defendant, but that the deceased was guilty of negligence.

Pollock, C. B., said: "It (the track) is in itself a warning of danger to those about to go upon it, and cautions them to see whether a train is coming."

Bramwell, B., said: "I proceed on this that in crossing the rails at all this woman was, as people often do heedlessly, going on at the rear of a passing vehicle at her side without waiting to see whether the other line was clear."

The plaintiff seeks to take this case out of the operation of this general rule because of the alleged particular circumstances of the case.

1st. That the signals were not given, the bell rung and the whistle blown.

2d. That the track from some points on the highway could not be seen.

3d. That the train was not on the time of any regular train.

4th. That they were running at unusual speed, and did not stop at the station.

5th. That the plaintiff's hearing was somewhat impaired.

These are the particular circumstances urged. Let us examine them briefly in their order.

Upon the first point that the signals were not given the bill of exceptions states that there was a conflict of testimony. But if the evidence were such that the jury should have found for the plaintiff that the signals were not given, would that destroy the operation of the general rule contended for? To so hold would excuse the plaintiff from the exercise of ordinary care, because the defendant had been guilty of negligence. The cases, however, hold that the plaintiff must be free from fault, and that the defendant's negligence will not dispense with affirmative proof of that fact on the part of the plaintiff. The cases cited above clearly sustain the point that neglect to give the signals is not always negligence on the part of the railroad company; that it is only evidence of negligence, and does not excuse the plaintiff from exercising what is always considered due care, the use of his senses of sight and hearing.

See Ernst vs. H. R. R. Co., 39 N. Y., 61, 68.

The Court there said: "A traveler approaching a railroad track is bound to use his eyes and ears so far as there is opportunity. Negligence in the railroad company in giving of signals or in omitting precautions of any kind, will not excuse his omission to be diligent in such use of his own means of avoiding danger. And where by such use of his senses the traveler might avoid danger, notwithstanding the neglect of the railroad to give signals or warning, his omission is concurrning negligence, and should be so peremptorily declared by the court. And where proof of this is clear the plaintiff thus negligent should be nonsuited."

See also St. Louis, Alton and T. R. R. Co., vs. Manly, 58 Ills., 300.

In Baxter vs. Troy and Boston Railroad Co., 41 N. Y., 506, it is said: "But the court clearly erred in refusing to charge the fourth proposition requested by defendant's counsel. That proposition was simply that the plaintiff was not relieved from ordinary prudence in approaching the crossing by the omission of the defendant to give the signals required by statute. The soundness of this proposition will appear from every well considered case involving the question, as well as from the elementary writers.

See also Wilcox vs. Rome, Watertown and Ogdensburgh Railroad Company, 39 N. Y., 358.

This has been frequently so decided in states where a statute required the ringing of the bell and sounding of the whistle when approaching a crossing.

Upon the second special circumstance alleged, that the track could not be seen at some points.

The evidence was not that the train could not be seen by a person traveling the highway, but that it could not be seen after he had commenced to descend the plane *until he came within a few feet of the crossing, at which point the track would be in view up to or beyond the depot.* See p. 5, folio 17, printed record.

The record does therefore clearly state that before going upon the track it was in sight up to or beyond the depot, a distance of between four and five hundred feet, and the plaintiff did not look or attempt to look. But even had the proof been that a traveler could not have seen before going on to the track, the law would not excuse him from listening. The judge who tried the case admitted this and so charged the jury. (See folio 30, printed record.) And yet we have the extraordinary statement that the plaintiff

did not stop to listen, when his hearing was somewhat impaired, and his wagon was making so much noise that a person of keener hearing could not in all probability have heard a train.

Can it be doubted that the train might have been seen and heard if the plaintiff had stopped to look and listen?

The defendant was in no way responsible for the noise made by the plaintiff's wagon, and had a right to proceed upon the expectation that he would stop and listen as well as look.

Thirdly, That the train was a special train and not upon any regular time.

The Court seemed to lay considerable stress upon this fact and charged the jury substantially that the plaintiff might be excused from using due care as to any train except a regular one on regular time. (See p. 9, folios 30 and 31.)

The Court said: "But as this was not a regular train, or on usual time, the same degree of caution would not be required on his part or such as if it were a regular train and on usual time."

Can this be the law? If so, no railroad company would be safe in running a special or extra train, and the common practice of making up time by regular trains when time has been lost would have to be abandoned, because highway travelers had read the time tables and knew when the regular trains were due at certain crossings All construction and other wild trains must run as the special risk of the company, or stop at every road crossing and ascertain whether some traveler is about to cross The record shows that during the same month of the accident forty-three such special trains had run over this road past the same place.

Would it not be safer to hold that a railroad crosssing is a "*warning of danger*" *at all times*, and that the company is at liberty to use its road in the ordinary way and for all trains without being subject to one set of rules for regular trains and another for specials, and that persons about to cross shall exercise common prudence and stop to look or listen whether they have reason to expect a regular train or not?

It is not probable that any railroad company could inform all travelers of the times when they will run special trains if they should try, and there would scarcely be time in most instances to give the notice. Is it not more sensible to say that *its track is notice to all persons that a train may be expected at any time?*

In Stubley vs. L. & N. W. Ry Co., 1 Exch., 13, above cited, Bramwell B., says: "But besides this I look at all those rules, regulations and provisions which are made to take care of people when they should take care of themselves as positively mischievous, and this case is an illustration of what I mean. Mr. Mamsty says that the watchman would know when the trains are to pass, but are there to be no special trains, no engines traveling backwards and forwards at uncertain times for the purpose of traffic which would not be expected, and of which he could give no warning?"

In Wilcox vs. Rome Ry. Co. 39 N.Y., 362, Miller J., said: "Every one conversant with the operations of a railroad is aware that extra trains are run out of the usual order and without regard to regularity, so as to render it unsafe to pass a crossing during the daytime without taking an observation to see whether a train is then likely to pass."

In that case as in this, the train was a special one, not on the time of the regular train, and the Court speaking of that circumstance, said: "It was remarked by Denio, J., in Wilds vs. the Hudson River Railroad Co., 29 N. Y., 325, no one can be secure against being met by an engine except by ascertaining by his own senses that no train is approaching in either direction within a distance which will endanger his safety. There is much force in this suggestion, and it would in my opinion furnish a very imperfect and unsafe protection to a traveler to rely merely upon his knowledge of the time table or upon the fact that an unusual train had passed in an opposite direction and therefore none other could be expected. The reason urged I think furnishes no sufficient excuse for the neglect of the deceased to use his faculties and for neglecting to exercise a proper degree of vigilance and care."

In Wilds vs. Hudson River Railroad Company, 29 N. Y., 325, the train was not upon time, and Denio J., said: "No person can reckon with any sort of safety upon the point of time when a train will pass over a particular place. (See record p. 325.)

In Haines vs. The Illinois Central Railroad Company, 41 Iowa, the train was behind time, yet that circumstance was not allowed to relieve the case from the operation of the general rule.

In Dascomb vs. Buffalo and State Line Railroad Company, 27 Barb., 221, the train was behind time, and it was held to be an immaterial circumstance.

It was there distinctly held that it was immaterial whether the train was on time or not. Martin J., said: "Assume in this case that it was negligence in the defendant to be be-

hind time, and will this in law excuse the defendant from observing care on his part? In my opinion it will not.

Such a rule would be extremely dangerous and there would be much difficulty in its application. It may be that those who live in the immediate vicinity of railroads, and who frequently cross them, may, when they suppose a train has just passed, be less careful, and this may grow into a habit, or they may consult time tables and from them reason that there can be no locomotive near, and act without regard to care, but if they do so in my opinion they act at their peril. They will be charged with negligence in case they rush on to the track without looking or trying in a proper way to ascertain the fact whether danger is near." See pp. 226, 227.

It is also alleged fourthly, that the train was running at unusual speed and did not stop at the station.

The greatest rate of speed mentioned is twenty-five miles per hour, and some of the evidence tends to show that the train was only running fifteen miles per hour.

This is not an uncommon rate of speed even at stations. Ordinary passenger trains run twenty-five miles per hour, including stops, and between stations the common rate of speed is from thirty to forty miles an hour. The faster express trains pass such villages as Lima, with six hundred inhabitants, without stopping at the stations at all, and scarcely lessen their speed, and no traveler has a right to assume that every train will stop at such a station. If they have been accustomed to stop before, the company has the right to change its time table and put on a through train or special, and the public may not be apprised of it until they see the train passing.

It is not uncommon for trains to run with considerable speed through populous cities for miles without haulting. The point where this accident happened was not in the village even, but on the highway leading to it. (See folio 16, printed record.)

The crossing was between four and five hundred feet from the depot, where trains that do stop may be passing with considerable speed, and where switch engines would naturally be passing and repassing occasionally. The place, then, was such as to require of the plaintiff more than usual care, and he was well acquainted with its character. If the train was moving rapidly it necessarily made more noise than a slower train, and this fact would strengthen the very strong presumption that had he stopped before attempting to cross the collision would have been avoided.

The fifth special circumstance, that the plaintiff's hearing was somewhat impaired, could only increase his duty to use his sense of sight more thoroughly. The Court admitted this and so charged. (See page 9, folio 30, printed record.)

From the statement contained in the record, that his hearing was *somewhat impaired*, it may be inferred that he could hear, but not so well as some other people do.

The company could in no manner be held responsible for that, for it had no knowledge of it. If he had stopped and tried to hear, if he had stopped to listen, so that the noise of his wagon would not have helped drown the noise of the approaching train, he would then have used only one of the precautions, but still his duty was to look, not one way, but both. He failed to take either precautions. Indeed the bill states (folio 19) "that *he took no precaution*

to discover whether or not a locomotive or train of cars was approaching from the north."

We submit that an examination of the authorities will convince the Court that none of the special circumstances alleged have ever been deemed sufficient to exempt a case from the operation of the general rule for which we contend.

The bill of exceptions purports to give the whole of the Judge's charge as it was given to the jury. Considering the evidence, and its tendency as stated in the bill, the charge was very unfavorable to the defendant.

If your Honors would observe a few trials of such cases at the Circuit, you would be very forcibly impressed with the fact that juries do not need much encouragement from the Court to find that as between a railroad corporation and a citizen, the corporation has been guilty of gross negligence and the citizen exceedingly careful. They are generally willing to find that the operation of a train in the usual manner is negligence, and to assume that it was the unmixed negligence of the corporation that caused the injury from the fact that collision occurred. And as a general rule the Court finds that it had enough to do if it succeeds in making the jury follow its instructions where they are correctly given.

Not only did he refuse to charge that speed alone was not negligence, but he argued that speed was negligence, and that the negligence of the defendant might excuse the plaintiff from exercising ordinary care. He charged the defendant with greater care for running on special time (see folio 27), and held the plaintiff to a slight degree of prudence because it was a special train. (See folio 31). The Court substantially said the defendant had been guilty of

negligence by not stopping at the depot, and by not ringing the bell *more energetically* than usual.

The other points mentioned in the assignments of error we have tried to discuss in considering the special circumstances of the case which are urged by the plaintiff as reasons why the case should not have been submitted to the jury. We rely upon them all and ask that they may be carefully considered. We do not think it necessary to discuss them separately. We submit that the case should have been taken from the jury if the uncontroverted evidence in the case was such as is recited in the bill of exceptions as to the manner of the plaintiffs approaching the track, and if there was a conflict of evidence upon that subject it should have been submitted to the jury under proper and specific instructions as to what constitutes negligence.

If the case were a proper one to submit to the jury at all the instructions given were altogether too favorable for the plaintiff.

HUGHES, O'BRIEN & SMILEY,

Counsel for Plaintiff in Error.

No. .....

U. S. OF AMERICA,

SUPREME COURT.

Error to the
CIRCUIT COURT FOR THE DISTRICT OF INDIANA.

THE CONTINENTAL IMPROVEMENT COMPANY, PLAINTIFF IN ERROR,
VS
JOSEPH STEAD.

BRIEF FOR DEFENDANT.

Filed .....1877.

..... Clerk.

In the Supreme Court of the United States.

THE CONTINENTAL IMPROVEMENT COMPANY, PLAINTIFF IN ERROR, vs. JOSEPH STEAD.	In Error to the Circuit Court for the District of Indiana.

The third amended paragraph of the plaintiff's complaint alleges, in substance, that, on the 22d day of November, 1872, the plaintiff in error was operating a railroad passing through the village of Lima, Lagrange county and State of Indiana, known as the Grand Rapids & Indiana Railroad; that said road runs upon and crosses the streets and highways leading into and through said village of Lima; that it crosses the Defiance road, one of the principal highways leading into said village, about thirty rods south of the passenger and freight buildings on said road in said village; that at the time of the injury to the defendant in error, the freight and passenger depot was near the track of the road, and that owing to the depression of the highway where it crossed

said railroad track, and the intervening houses, fences, trees and railroad cars, on the plaintiff's side track, it was about, if not quite, impossible for a person passing along the highway to see or hear a train approaching from the north on said road; that the plaintiff was, on the day aforesaid, passing along and upon said highway, and that the plaintiff in error was running an engine and train of cars upon it's road at a dangerous rate of speed, to-wit, thirty miles per hour, and without stopping at said depot, (where trains from the north were accustomed to stop,) without abating it's speed, without ringing a bell or blowing a whistle, or giving other signal, recklessly and carelessly ran against the plaintiff, destroyed his wagon and seriously injured him. It is averred that Stead was without fault, and the train was not running upon any regular time, but lawlessly.

The allegations of the complaint were denied by the plaintiff in error.

The testimony is not set out in the bill of exceptions, but it is conceded, we think, that the testimony tended to support the allegations of the complaint.

That the plaintiff was operating the road, that it passed through or touched the village of Lima, and crossed the highway as alleged in the complaint, will not be denied, nor will it be denied that the engine ran against the plaintiff's wagon, destroying it and seriously injuring him. It is admitted that the testimony TENDED to show that the engine was running twenty-

have miles per hour; that it also tended to prove that there was no abatement of speed at the crossing; that no warning of the approach to the crossing was given; that the road and railroad track were depressed at the crossing five feet below the surface of the adjoining ground; that the intervening houses, trees, fence and cars placed by the plaintiff in error upon it's side-track, rendered it difficult, if not impossible, to see or hear a train approaching said crossing from the north. There was also testimony tending to show that the train causing the injury was not running on regular time, and that there was no regular train due at that point at the time of injury; that regular trains always stopped at the depot north of the crossing.

The verdict of the jury gives the tendency of the testimony controlling force, and legally establishes whatever it tended to prove in support of the averments of the complaint, as the actual facts in the case. And in like manner it must be held as a complete legal refutation of any fact adverse to the defendant in error, which the testimony may have TENDED to establish. It must be held that the plaintiff was running over the crossing at the rate of twenty-five miles per hour; that it failed to give any notice of it's approach to the crossing by sounding a whistle, ringing a bell, or otherwise; that it had placed cars on its side track so as to prevent travelers upon the highway from seeing or hearing the trains approach the crossing. These facts the jury have found, and as the evidence is not in the record, this court can not say that in their finding the jury erred.

If these facts are to be regarded as [illegible] lished, the plaintiff in error was guilty of gross negligence; that negligence which evinces a willingness to inflict injury; a recklessness of human life which renders it liable, though the defendant in error was not free from fault. The Supreme Court of Indiana, in the case of Lafayette & Indianapolis Railroad Company vs. Adams, 26 Ind. 76, held that it was gross negligence in a railroad company to run a train through a town at a much less rate of speed than twenty-five, or even twelve, miles per hour. Wharton, in his work on negligence, Sec. 386, says:

"Where the view of the road is obstructed, "or where other circumstances make a look-out "inadequate, the omission of signals is negli- "gence, making the company liable."

MUCH MORE must this be so where the company itself, as in this case, contributes by placing it's cars upon side-tracks to obscure the view and render the look-out inadequate.

Here the jury have found that the look-out was inadequate; that no signals were given; that the train was not upon regular time; that the company obscured the view from the crossing by leaving the cars upon the side-track.

It is to be borne in mind that the testimony does not show that Stead, by looking, could have seen or heard the train; it tends to show that he could not, and so the jury have found. If looking, under the circumstances, would not

have availed him, he is not to be charged with negligence for not looking. It is only where, by the use of his senses, the traveler might avoid danger, that the omission to use them is negligence. We conclude, therefore, that the judgment below will not be disturbed, unless the court erred in refusing to give the instructions asked by the plaintiff in error, or in the instructions which it gave to the jury. The first instruction asked by the plaintiff in error required the court to charge the jury, AS MATTER OF LAW, that Stead's failure to look up and down the track, before going upon it, was negligence PER SE. This the court declined to do, but left it, under all the circumstances of the case, to the jury to say whether he was guilty of negligence. Under the circumstances of this case, it was clearly the duty of the court to refer the question of negligence, as matter of fact, to the jury. Wharton says, Sec. 386:

"If the view of the railroad, as the crossing "is approached upon the highway, is obstructed "by any means, so as to render it impossible "or difficult to learn of the approach of a train, "or there are complicated circumstances calcu- "lated to deceive or throw a person off his "guard, then, whether it was negligence on the "part of the person injured, under the particu- "lar circumstances of the case, is a question of "fact for the jury."

Here the view was obstructed, and the train was a wild train, having no regular time. The court did not err in refusing this charge.

The second charge asked and refused, is not,

we think, the law, and it should not have been given for several reasons: it is not, as matter of law, the duty of the traveler to ASSURE himself by looking or listening, before going upon a railroad track, that a safe crossing is practicable. If he must thus assure himself, then no case can happen in which he can recover. That which is assured is certain, and if the traveler has assured himself a safe crossing no injury is possible. He must do all that a prudent, cautious man, under the circumstances, would do, to assure himself a safe crossing. This the court charged, and it is all the law requires. (Railroad Co. vs. Whitton, 13 Wallace, 276.)

If the railroad track was obscured, then, whether Stead was guilty of negligence was a question of fact for the jury, not a question of law to be determined by the court.

The third charge asked and refused is still more objectionable. It required the court to withdraw the case from the jury and decide the facts as well as the law.

By the fourth charge asked, the court is required to charge the jury, as matter of law, that engineers of a steam engine should look neither to the right nor left, but straight ahead. The meaning of this is, that engineers should not see, if by constantly looking straight ahead they can avoid doing so, a person approaching a street crossing. We think it was better to leave this question with the jury, as the court below did.

What we have said in regard to the first and second instructions asked and refused will apply to the fifth. We think the instructions substantially the same as those refused in the case of Railroad Co. vs. Whitton supra, and that that case is decisive of this.

The instructions given by the court were substantially the same as those given in the case of Railroad Co. vs. Whitton. The court gave to the jury a clear and full charge upon the duties and responsibility of the railroad company in crossing the streets of the village with it's engines and trains, and upon the care, prudence and caution which it was incumbent upon the defendant in error to exercise in crossing the track.

We think the refusal of the court to give the charge asked by the plaintiff in error might be justified on the ground that the company was guilty of gross negligence, and that Stead was entitled to recover, though not free from fault. If the company obstructed the view of the track from the crossing by leaving it's cars upon the side-track, ran a wild train (as those not running upon time are properly called) over the crossing at a speed of twenty-five miles per hour, without giving any signal or warning, surely it was guilty of the grossest and most censurable negligence.

It is admitted that the evidence tended to prove this, and the court will, before disturbing the judgment below, assume that the testimony proved these facts to the satisfaction of the jury.

If so, then the law is well settled, we think, that the negligence of Stead, if he was negligent, will not preclude his recovery. Wharton says:

"The plaintiff's negligence in approaching a "track is no defense if a train could have pru- "dently avoided the collision. This results "from the position already laid down that a "trespasser can not be run down with impunity "simply because he is a trespasser. To rail- "road trains, in view of the destructive power "they carry with them, this position is pecu- "liarly applicable. Hence, it is justly held "that, though a person be injured while unlaw- "fully on the track, or contributes to the injury "by his own negligence, yet, if the injury might "have been avoided by the use of ordinary "care and caution by the company, they are "liable for damages for the injury." Sec. 388.

In this case, by reducing the rate of speed, by running the cars that obstructed the view off the track, and by giving the proper signals, the injury might have been avoided, notwithstanding any negligence that might be even plausibly imputed to Stead. (Brown vs. Hannibal & St. Jo. R. R. Co.; 50 Mo. 461. Gray vs. Scott; 66 Penn St. R., 345. Trow vs. Railroad Co.; 24 Vt. 487. Kernhacker vs. C. C. & R. Co.; 3 Ohio St., 172. Railroad Company vs. Caldwell; 9, Ind., 397. Railroad Co. vs. Adams; 26 Ind., 76. Bellefountaine R. R. vs. Hunter; 33 Ind., 365. Railroad Co. vs. State; 36 Md., 366; 33 Md., 542.)

These authorities show that in every aspect in which the case can be viewed, the judgment

below is just and right, and that it should not be disturbed. We trust it will be affirmed.

J. L. Loomis
for deft